No. 16-1454

IN THE

Supreme Court of the United States

STATES OF OHIO, CONNECTICUT, IDAHO, ILLINOIS, IOWA, MARYLAND, MICHIGAN, MONTANA, RHODE ISLAND, UTAH, AND VERMONT,

Petitioners,

v.

AMERICAN EXPRESS COMPANY, AND AMERICAN EXPRESS TRAVEL RELATED SERVICES COMPANY, INC.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF 20 MERCHANTS AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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INTEREST OF AMICI CURIAE[1]

Amici are merchants of varying size who sell goods or services in diverse industries in all areas of the country. The thread that binds amici here is a strong one: each has first-hand knowledge of the anticompetitive effects of American Express's "Non-Discrimination Provisions," which prohibit merchants from informing their customers of the high cost of American Express's credit cards and of the availability of less-expensive alternatives. These provisions are therefore more fairly characterized as "anti-steering rules" because they substantially impede point-of-sale competition between American Express and its rivals.

As customers of American Express's network services for general purpose credit and charge cards ("GPCC"), amici are uniquely situated to assist this Court in understanding the anticompetitive effects of American Express's conduct and the pernicious impact the anti-steering rules have had on the business community and consumers. Those effects were fully supported by the district court's comprehensive factual findings and are further borne out by amici's day-to-day experience in the marketplace. Amici's interest is in seeing American Express's anticompetitive conduct permanently

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[1] Pursuant to this Court's Rule 37.6, amici state that no counsel representing a party authored this brief in whole or in part, and no person or entity other than amici or their counsel made a monetary contribution intended to fund the preparation or submission of this brief. Pursuant to this Court's Rule 37.3(a), amici state that counsel of record for Petitioners and Respondents have consented to the filing of this brief.

enjoined, so that the competitive process of the marketplace—the unencumbered and informed interaction of merchants, consumers, and other providers of network services for GPCCs—can be the arbiter of the price of network services and the value of rival card networks, not American Express.

SUMMARY OF ARGUMENT

"The antitrust laws," this Court recently wrote, "declare a considered and decisive prohibition by the Federal Government of cartels, price fixing, and other combinations or practices that undermine the free market." *N.C. State Bd. of Dental Exam'rs v. FTC*, 135 S. Ct. 1101, 1109 (2015). The anti-steering rules ("ASRs") that American Express has imposed upon its merchants, including amici, have not only undermined the free market—they have "broken" it. *United States v. Am. Express Co.*, 88 F. Supp. 3d 143, 210 (E.D.N.Y. 2015) (*American Express I*). Following a seven-week bench trial, the district court reached precisely this conclusion. Based on amici's experience as market participants, and the settled antitrust jurisprudence that the district court faithfully applied, this conclusion was unassailable: at the hands of American Express's ASRs, competition for GPCC network services has been virtually abolished.

But the Second Circuit reversed. Drawing principally on selective economic literature not previously relied upon by any court, the Second Circuit determined that the district court erred by failing to sufficiently account for the fact that American Express operates its business on a "two-sided platform." In reaching this decision, the Second Circuit strayed from fundamental antitrust

principles, ignored binding precedent from this Court, and failed to appropriately credit the factual findings of the district court. Amici respectfully request that this Court effectuate the Sherman Act's purpose—to "promote robust competition," *N.C. State Board of Dental Examiners*, 135 S. Ct. at 1109—and reverse this erroneous decision for at least the following reasons.

Most fundamentally, the Second Circuit misconstrued the government's theory of anticompetitive effects and disregarded the district court's findings concerning those effects. The district court concluded that the government had proven multiple *actual* anticompetitive effects flowing from the ASRs, including reducing interbrand competition among network service providers, increasing prices for both merchants and consumers, and deterring lower-cost entrants and innovation. The district court consequently found that merchants and consumers would be better off without the ASRs because an unrestrained competitive process would yield the best results for the marketplace.

The Second Circuit mostly ignored these factual findings of anticompetitive effects (while never concluding that they were clearly erroneous). Instead, the court proposed novel principles for applying the antitrust laws to business models involving two-sided platforms. In doing so, it redirected the focus of its antitrust inquiry away from the direct and substantial evidence of actual competitive harm to the relevant market, concluding that the district court erred by failing to include both sides of the platform in that market. This approach was legally unsupported and economically unsound.

With undisputed actual anticompetitive effects already established, the primacy the Second Circuit afforded the relevant market question was misguided. The foundation goal of the rule-of-reason inquiry under Section 1 of the Sherman Act is to ascertain the impact of a challenged practice on competition. *See Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 691 (1978). Anticompetitive effects can be demonstrated through direct or circumstantial evidence, and sometimes both. But as this Court has held, market definition is a "surrogate" for anticompetitive effects that relies on potential and prediction, and is not required when direct evidence of actual effects is present. *FTC v. Ind. Fed'n of Dentists*, 476 U.S. 447, 460-61 (1986); *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 108-10 (1984) [hereinafter "*NCAA*"]. As this Court stated in *Indiana Federation of Dentists*, "the purpose of the inquiries into market definition and market power is to determine whether an arrangement has the potential for genuine adverse effects on competition." 476 U.S. at 460. The Second Circuit did not—and could not—dispute the adverse effects on competition for GPCC network services caused by the ASRs. Its shift of focus to market definition, therefore, was alone reversible error.

The Second Circuit further held that the government plaintiffs bore the burden of establishing a net harm to "*all* Amex consumers on both sides of the platform." *United States v. Am. Express Co.*, 838 F.3d 179, 205 (2d Cir. 2016) (*American Express II*). Even if the market *was* broadly defined to include both "sides" of the American Express platform—an unprecedented

approach to relevant market definition that amici oppose—the district court's findings of anticompetitive effects still support its conclusion that the ASRs unreasonably restrained competition. In other words, the direct evidence and circumstantial evidence were consistent and aligned, and both pointed in the direction of substantial harm to competition. This was true even if the correct measure was "net" harm to competition because of the district court's specific finding that all consumers were harmed in addition to all merchants, and that the harm to the merchants and their consumers was far in excess of any benefits realized by American Express's cardholders. The Second Circuit's intense focus on the American Express platform—as opposed to all merchants, all consumers, and the competitive process more generally—fails to appreciate the government's argument and the court's finding that the focal point of the harm here was to horizontal, interbrand competition. As this Court has repeatedly held, the protection of such competition is the paramount aim of the antitrust laws. The Second Circuit's decision, which would countenance the elimination of interbrand competition for network services, is inimical to that objective.

Just as troubling, the ASRs' restriction on the dissemination of truthful information further disrupts the competitive process by rendering it unresponsive to consumer preference. The Sherman Act—a "consumer welfare prescription"—cannot have contemplated such a result. *NCAA*, 468 U.S. at 107 (citation omitted).

The Second Circuit's approach to redefining the relevant market was equally flawed. Ignoring the intensely factual nature of the relevant market

inquiry and the settled legal principles that guide this factual determination, the Second Circuit concluded that the relevant market in this case must include both sides of the American Express platform. A relevant product market includes reasonably interchangeable products in terms of price, use, and quality. Amici—merchants—are consumers of American Express and its competitors' network services. Amici cannot substitute cardholder products and services for network services, and therefore, cardholder products and services cannot serve as a competitive constraint on network services—even if the two are complementary and interdependent. These products are therefore not in the same relevant market. The Second Circuit's decision to the contrary ignores these commercial realities and the district court's factual findings in favor of an abstract economic theory that is inconsistent with well-established principles of market definition that are used under Sections 1 and 2 of the Sherman Act, as well as Section 7 of the Clayton Act.

In its effects analysis flowing from the improperly redefined relevant market, the Second Circuit also recognized a defense long precluded by this Court's precedent. In arguing that the ASRs are needed to promote competition, American Express has effectively admitted both that it exercises market power on the merchant side of the platform and that its credit and charge cards cannot compete without the ASRs. The Second Circuit also recognizes as much, stating, "[t]he relief sought by the government in this case [enjoining the ASRs] could even increase market concentration by reducing Amex's share to Visa's and MasterCard's

benefit." *American Express II*, 838 F.3d at 204 n.51. But the antitrust laws are not intended to protect competitors or shield noncompetitive products from free-market competition, they are intended to protect that competition and accept its results. And in exonerating the ASRs, the Second Circuit placed the interests of a single firm and its preferred (and admittedly noncompetitive) business model above the competitive process. The district court correctly rejected this invitation; the Second Circuit did not.

The decision of the Second Circuit should be reversed.

ARGUMENT

I. THE SECOND CIRCUIT MISCONSTRUED THE GOVERNMENT'S THEORY OF ANTICOMPETITIVE EFFECTS AND ERRONEOUSLY FAILED TO CREDIT SUBSTANTIAL EVIDENCE OF THOSE EFFECTS.

While the Second Circuit's analysis centered largely on relevant market definition, amici wish to highlight the primacy of competitive effect. As this Court has observed in the context of Section 1, market analysis is secondary to the ultimate focus of any Sherman Act inquiry: whether there are adverse effects on competition. In the trial court, the government proved that the ASRs had *actual* anticompetitive effects: by preventing merchants from informing consumers of the true cost of using an American Express card, the ASRs extinguished any incentive on the part of network service providers to compete on price; diminished competition; discouraged entry and innovation; and facilitated horizontal anticompetitive effects. This

showing was sufficient to satisfy the government's burden. In redirecting the inquiry to the market analysis, the Second Circuit failed to adhere to this legal principle, misconstrued the government's posited theory of harm, and failed to properly credit the well-supported findings of the district court. As consumers of the network services affected by American Express's ASRs, amici are well-positioned to discuss the actual competitive harms established by the government.

A. The district court's findings that the government established actual anticompetitive effects were fully supported by the record evidence and are consistent with the real-world experience of amici.

Anticompetitive effects may be shown directly or indirectly. As the district court correctly observed, to prove anticompetitive effects directly, the plaintiff must show "'actual, sustained adverse effects on competition.'" *American Express I*, 88 F. Supp. 3d at 208 (quoting *Ind. Fed'n of Dentists*, 476 U.S. at 460-61). Alternatively, the plaintiff may prove harm to competition indirectly through circumstantial evidence showing market power in a relevant market and the anticompetitive nature of the restraint. *See id.* As this Court has previously observed, "[s]ince the purpose of the inquiries into market definition and market power is to determine whether an arrangement has the potential for genuine adverse effects on competition, 'proof of actual detrimental effects, such as a reduction in output,' can obviate the need for an inquiry into market power, which is but a surrogate for detrimental effects.'" *Ind. Fed'n of Dentists*, 476 U.S.

at 460-61 (quoting 7 Phillip Areeda, *Antitrust Law* ¶ 1511 at 429 (1986)). Following this Court's instruction, several circuit courts are in accord. *E.g.*, *Todd v. Exxon Corp.*, 275 F.3d 191, 206-07 (2d Cir. 2001) (Sotomayor, J.) (explaining that a plaintiff may avoid a "'detailed market analysis'" by offering proof of actual detrimental effects (citation omitted)); *Christy Sports, LLC v. Deer Valley Resort Co., Ltd.*, 555 F.3d 1188, 1198 (10th Cir. 2009) (noting in the Section 1 context that "allegation of actual anticompetitive effects obviates any need to allege a relevant market"). The principle has also been applied in the context of monopolization claims asserted under Section 2. *See, e.g.*, *Re/Max Int'l, Inc. v. Realty One, Inc.*, 173 F.3d 995, 1016 (6th Cir. 1999) ("We find that although the plaintiffs failed to define the relevant market with precision and therefore failed to establish the defendants' monopoly power through circumstantial evidence, there does exist a genuine issue of material fact as to whether the plaintiffs' evidence shows direct evidence of monopoly, that is, actual control over prices or actual exclusion of competitors."); *United States v. Microsoft Corp.*, 253 F.3d 34, 51 (D.C. Cir. 2001) ("More precisely, a firm is a monopolist if it can profitably raise prices substantially above the competitive level. Where evidence indicates that a firm has in fact profitably done so, the existence of monopoly power is clear." (citations omitted)).

The upshot of these decisions is that the primary function of the relevant market inquiry is to serve as a step in the chain of indirectly demonstrating injurious effects to competition. It is less important where, as here, the plaintiff produces direct evidence of actual anticompetitive harm. And it surely should

not take precedence to the point of substituting for evidence of actual competitive harm.

In its detailed factual findings, the district court found that the government proved *actual* detrimental effects on competition among the four credit and charge card networks—American Express, Visa, MasterCard, and Discover. *See American Express I*, 88 F. Supp. 3d at 207-24. Many of these key factual findings were largely uncontested by the Second Circuit, and in the Second Circuit's decision, not a single factual finding was deemed "clearly erroneous." Fed. R. Civ. P. 52(a)(6). The unchallenged anticompetitive effects proven by the government include the following:

1. The Second Circuit never questioned the district court's finding that "the challenged restraints impede a critical form of horizontal, interbrand competition." *American Express I*, 88 F. Supp. 3d at 212. The district court found that by restricting merchants' ability to steer customers to lower-priced networks, the ASRs disrupted the normal price-setting mechanisms in the marketplace. *Id.* at 209. Because "[s]teering is a lynchpin to inter-network competition on the basis of price," the ASRs prevent American Express's competitors from "increas[ing] sales or gain[ing] market share by offering merchants a more attractive price than [their] competitors." *Id.* at 210. Trial testimony established that "[o]nce you have acceptance at th[e] merchant, lowering your price . . . does not drive incremental sales." *Id.* In other words, "Amex's [ASRs] deny its competitors the ability to recognize a 'competitive reward' for offering merchants lower swipe fees, and thereby

suppress an important avenue of horizontal interbrand competition." *Id.*

The district court further noted that American Express's pricing strategy confirmed the harm to interbrand competition. At trial, American Express acknowledged the absence of price competition for merchant pricing in the network services market, and in setting prices American Express does not account for any downward pressure from the swipe fees its competitors charge. *Id.* Instead,

> Amex uses Visa's and MasterCard's rates as a floor when evaluating its own discount rate in various industries [and] similarly felt no pressure to lower their own prices or otherwise respond to Discover's efforts in the late 1990s to build its share in the network services market by offering merchants prices well below those charged by its competitors.

Id. American Express officials testified that it was not "anybody's business strategy [] to be cheaper than the next guy," and that "[w]e should not compete on costs with" Visa and MasterCard. *Id.* This evidence demonstrated that "American Express itself recognizes the absence of competition on the basis of merchant pricing in the network services market." *Id.*

Nowhere does the Second Circuit identify error in the district court's findings regarding American Express's pricing strategy and its stated view that competition on pricing of network services to merchants was non-existent. Nor did the Second Circuit find any error in the description of the

horizontal, interbrand harm in the network services market that was attributable to the ASRs.

2. The Second Circuit similarly did not question the evidence supporting the government's theory that the ASRs allowed *all four* networks to more easily (and profitably) raise their merchant discount fees, resulting in industry-wide higher prices to merchants. *Id.* at 215-16. This was because the ASRs prevented merchants from steering customers to lower-cost networks and transactions—something merchants would have done absent the restrictive provisions.[2] *Id.* at 215. The district court found that without affording merchants the ability to steer, American Express and its competitors' incentives to price compete on merchant fees was dampened. *Id.* at 224. Prices rose accordingly and continually over time. For instance, American Express was able to raise merchant discount rates repeatedly and profitably pursuant to its "Value Recapture" strategy while never losing a large merchant and losing only a few small merchants. *Id.* at 195, 215. Visa and MasterCard were also able to increase merchant fees by more than 20% from 1997 to 2009. And after the ASRs rendered its low-price strategy futile, Discover was able to "radically" increase its prices over a relatively short period of time to "match the rates set by its competitors." *Id.* at 216. These price increases were accomplished "with virtual impunity, relying on the restraining effect of the anti-steering rules." *Id.* These findings—none of which were

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[2] For example, trial testimony revealed that four major commercial airlines sought to modify or eliminate the ASRs to no avail. *Id.* at 219-21.

found to be clearly erroneous—established the undisputed price-raising and price-stabilizing effects of the ASRs.

The district court also found that consumers bore the brunt of these price increases. Obligated to pay higher per-transaction costs, merchants began increasing the prices of goods, thereby sharing the ASRs' economically-detrimental effects with consumers. *Id.* ("Merchants facing increased credit card acceptance costs will pass most, if not all, of their additional costs along to their customers in the form of higher retail prices."). The effect on consumers is especially profound for non-American Express cardholders, who could not have benefited from any alleged "benefits" created by American Express's cardholder reward programs:

> Even if American Express passed through every cent of its premium or the incremental revenue realized from its Value Recapture price increases to cardholders—which it does not—customers who do not carry or qualify for an Amex card are nonetheless subject to higher retail prices at the merchant, but do not receive any of the premium rewards or other benefits conferred by American Express on the cardholder side of its platform.

Id. American Express cardholders also paid these higher prices, as the American Express rewards programs did not mitigate the costs imposed on merchants and passed on through price increases. *See id.* (citing testimony establishing "that American

Express spends less than half of the discount fees it collects from merchants on cardholder rewards").

The Second Circuit mostly ignored the finding that merchants and consumers paid higher prices, asserting in a footnote (with no analysis or record support) that the district court erred by failing to account for offsetting rewards benefits. *American Express II*, 838 F.3d at 204 n.52. But as the passage above demonstrates, the district court did account for offsetting rewards—indeed, it even assumed that American Express cardholders received *greater* benefits than they in fact did. Nonetheless, the district court still found that the harm far exceeded any offsetting benefits to American Express cardholders. The Second Circuit ignored the plain import of the district court's finding—that is, any realized transfer of the higher merchant fees to American Express's rewards customers never could have fully eliminated the anticompetitive effects. This is because *all* consumers suffered from these effects in the form of higher prices, and only American Express's rewards customers had even the possibility of sharing in American Express's excess profits. The Second Circuit's rejection of this finding was therefore unsupportable.

3. Nor did the Second Circuit find error with the district court's finding that the ASRs blocked innovative, low-cost business models. Informed by the experience of Discover—the most recent entrant of the four major GPCC network providers—the district court found that the ASRs undermined low-cost business models that were used by Discover (and could be used by other new market entrants). Entering the network services market in 1985, "Discover saw an opportunity to leverage its position

as the lowest-priced network to gain share." *American Express I*, 88 F. Supp. 3d at 213. The company engaged in a "very aggressive[]" pricing strategy, with "all-in discount rates significantly below those of its competitors." *Id.*

But industry ASRs proved to be an insurmountable hurdle to capturing market share. The district court found that because of the ASRs, "Discover's efforts . . . failed to produce []any significant movement" in market share. *Id.* at 213-14. The ASRs "denied merchants the ability to express a preference for Discover [to their customers] or to employ any other tool by which they might steer share to Discover's lower priced network." *Id.* at 214.

Unable to compete on price, Discover eventually raised its prices for network services—nearly 24%—to levels similar to those charged by American Express, Visa, and MasterCard. *Id.* The district court described this increase as the result of Discover "[r]ecognizing that its lower prices would not drive incremental volume to its network in a market subject to limitations on merchant steering." *Id.* As one Discover witness testified, because of the ASRs, lower price did not drive incremental sales, so "offering a lower price . . . was leaving money on the table," and providing merchants a "discount without getting anything in return didn't make any business sense." *Id.* With interbrand price competition for network services eliminated, Discover's incentive to offer lower prices was squelched, and it was forced to abandon its low-cost model and instead adopt "prices . . . similar to those offered by Visa and MasterCard" as well as "the more complicated 'unbundled' pricing model used by those networks." *Id.* These findings

again underscore the soundness of the government's theory as to how the ASRs resulted in horizontal price stabilization, a theory that was entirely supported by the record.

The district court concluded that Discover's change in business strategy—along with all developments leading it—was "emblematic of the harm done to the competitive process by Amex's rules against merchant steering." *Id.* The Second Circuit neither identified any error in these findings nor disputed the reality of how ASRs prevented Discover from implementing its lower-price strategy. In fact, the Second Circuit was silent on most of these facts. The Second Circuit's sole comment on these findings was related to its departure from its earlier decision in *United States v. Visa U.S.A.*, 344 F.3d 229 (2d Cir. 2003), and its insistence that the two-sided platform required consideration of more than just the effect on the merchants. But the Second Circuit never disputed the detrimental effect on merchants and their consumers in the form of higher prices, and on both entry and innovation.

4. Given the conclusion that ASRs harm both merchants and consumers in the manner described above, it is hardly surprising the district court found that removing the provisions would benefit both merchants and consumers. *See id.* at 218-24.

Without the ASRs, network providers could engage in a wide variety of price and non-price competition at the merchant level. Merchants would be able to "direct a greater share of their charge volume to lower-cost credit or charge card networks, whether by offering discounts to customers for using such cards, posting the relative costs of different

modes of payment, or engaging in another form of point-of-sale steering." *Id.* at 219. Such competition would help restore "downward competitive pressure on merchant prices . . . result[ing] in lower swipe fees charged to merchants." *Id.*

The district court also found that removing the ASRs would provide consumers with multiple benefits. Lower merchant fees—as a result of downward pressure—would, in turn, lower prices paid by consumers for goods and services across the board. *Id.* at 221 ("In the longer term, the court expects that merchants will pass along some amount of the savings associated with declining swipe fees to their customers in the form of lower retail prices."). Consumers may also benefit from the immediate impact of steering. For example, merchants could offer point-of-sale discounts, free shipping for transactions, or free lodging in return for using the merchant's preferred credit card. *Id.* at 220. And without the ASRs, cardholders could be more informed about the costs of using one payment network instead of another. Aware of the "true cost" of their payment method, cardholders could then weigh whether the issuer's benefits to the cardholder (e.g., American Express cardholder rewards) "[w]ere of greater value than the discount, in-kind perk, or other benefit offered by the merchant." *Id.* at 220. The customer who values American Express's rewards may choose to forgo a point-of-sale discount of what the cardholder perceives as a lesser value. Another cardholder may find the free shipping to be a greater value than American Express's rewards for that particular transaction. This dynamic would, in turn, jump start competition among card issuers—they could increase the value of their cardholder

rewards or, to facilitate greater point-of-sale discounts or perks, decrease merchant fees in an effort to match or exceed the benefits that competing issuers provide. *See id.* at 213 ("Discover representatives also met with a number of larger merchants to offer discounts from the network's already lower prices if they would steer customers to Discover."). Different structures may appeal to different consumers. But the ASRs inhibit the ability of merchants, card issuers, and networks to compete on any terms other than those American Express prefers.

The Second Circuit did not hold that any of the above *factual* findings was clearly erroneous, concluding instead as a *legal* matter that "[t]he District Court's erroneous market definition caused its anticompetitive effects finding to come up short, for it failed to consider the two-sided net price accounting for the effects of the NDPs on both merchants and cardholders." *American Express II*, 838 F.3d at 204. But in the face of compelling evidence of substantial anticompetitive effects, the Second Circuit strayed from the ultimate purpose of the analysis of any Sherman Act claim—determining anticompetitive harm. By instead reverting to, and placing such a heavy, outcome-determinative focus on, market definition as opposed to the effects analysis, the Second Circuit ignored the well-established and long-standing precedents of this Court and others, committing reversible error.

B. The Second Circuit failed to appreciate the horizontal, interbrand character of the anticompetitive effects of the restraint.

In attempting to distinguish the Second Circuit's prior—and correct—decision regarding the relevant market in *Visa*, the Second Circuit demonstrated its fundamental misunderstanding of the nature of the competitive harm established in this case. More specifically, the Second Circuit attempted to distinguish the relevant market analysis in *Visa* on the basis that the restraints there were horizontal, while the restraints here are vertical. *American Express II*, 838 F.3d at 197-98. In making this distinction, the court failed to recognize the relation between the vertical conduct at issue (the ASRs) and the horizontal harm (elimination of competition among the four networks for network services). The Second Circuit wrote, "[u]nlike the contested conduct in this case, the contested conduct in *Visa* occurred not among different sides of the same network platform, but rather between the platforms themselves" and that "the *Visa* panel conducted a rule-of-reason analysis to determine whether *horizontal* restraints were inhibiting competition on one particular *level* of competition contained within a two-sided platform." *Id.* at 198.

But as this Court has noted, regardless of the form the restraint may take, "all anticompetitive effects are by definition horizontal effects." *Bus. Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 730 n.4 (1988); *see also Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 892-94 (2007) (noting that vertical restraints may be used to facilitate a cartel or exclude rivals and new

entrants—both horizontal harms). And, as discussed above, that is precisely what the district court found here: that the ASRs "suppress [American Express's] network competitors' incentive to offer lower prices . . . vitiating an important source of downward pressure on Defendants' merchant pricing, and resulting in higher profit-maximizing prices across the network services market." *American Express I*, 88 F. Supp. 3d at 209. In other words, the ASRs thwarted horizontal competition among the networks—just as in *Visa*—notwithstanding that the ASRs can be characterized as "vertical" conduct. Consequently, the particular nature of the restraint in *Visa* is of no moment to the effects analysis here—the horizontal, interbrand nature of the harm is the same.

In disregarding the trial court's findings, the Second Circuit also did not sufficiently heed this Court's instruction that the primary purpose of the antitrust laws is to protect and promote interbrand competition. This Court has recently reaffirmed that "[t]he promotion of interbrand competition is important because 'the primary purpose of the antitrust laws is to protect [this type of] competition.'" *Leegin*, 551 U.S. at 890 (quoting *State Oil Co. v. Khan*, 522 U.S. 3, 15 (1997)). The district court plainly found that the ASRs harmed interbrand competition, *American Express I*, 88 F. Supp. 3d at 208-12, yet the Second Circuit wholly failed to grapple with this critical finding, focusing instead on the two sides of the American Express platform alone. The Second Circuit wrote, "[b]ecause the NDPs affect competition for cardholders as well as merchants, the Plaintiffs' initial burden was to show that the NDPs made *all Amex consumers* on

both sides of the platform—*i.e.*, both merchants and cardholders—worse off overall." *American Express II*, 838 F.3d at 205 (second emphasis added). In so holding, the Second Circuit misconstrued the true harm of the ASRs: the reduction—or eradication—of horizontal, interbrand competition among the networks. And, as discussed, this reduction in interbrand competition resulted in prices to merchants being raised and stabilized industrywide, a cartel-like result similar to that challenged in *Visa*. *See also United States v. Apple Inc.*, 791 F.3d 290, 320 (2d Cir. 2015), *cert. denied*, 136 S. Ct. 1376 (2016) (noting that vertical "most favored nation" clauses, while proper in many contexts, can "'facilitate anticompetitive horizontal coordination'" (quoting Jonathan B. Baker, *Vertical Restraints with Horizontal Consequences: Competitive Effects of Most-Favored-Customer Clauses*, 64 Antitrust L.J. 517, 520-21 (1996))).

None of this is inconsistent with the line of cases cited by the Second Circuit stating that a plaintiff must establish an adverse effect on competition "as a whole" in the relevant market, which the Second Circuit misinterpreted as requiring evidence of adverse effects on both sides of a two-sided platform. *E.g.*, *American Express II*, 838 F.3d at 194, 204. The Second Circuit misread these cases, which have nothing to do with two-sided platforms and merely state that antitrust plaintiffs must demonstrate harm to *competition* as opposed to harm just to competitors. *E.g.*, *K.M.B. Warehouse Distribs., Inc. v. Walker Mfg. Co.*, 61 F.3d 123, 127 (2d Cir. 1995) ("The district court in this case concluded that KMB failed to meet its initial burden of showing 'an actual adverse effect on competition as a whole in the

relevant market.' In order to fulfill this requirement, the plaintiff must show more than just that he was harmed by defendants' conduct."). This is simply a restatement of this Court's axiom that "[t]he antitrust laws . . . were enacted for 'the protection of competition not competitors.'" *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977). The district court's finding of harm to interbrand competition, rather than to any particular competitor, is in complete harmony with these cases.

But in any event, the Second Circuit's decision misreads and misapplies the rule articulated in *K.M.B.* because it focused exclusively on American Express cardholders and merchants that accept American Express, rather than the market "as a whole"—that is, *all* merchants and *all* consumers. The decision concludes, "Plaintiffs bore the burden in this case to prove net harm to *Amex consumers* as a whole. . . ." *American Express II*, 838 F.3d at 206 (emphasis added). Again, the Second Circuit overlooked the higher prices to *all* merchants and *all* consumers resulting from lack of competition in the network services market due to the ASRs. *American Express I*, 88 F. Supp. 3d at 218 ("Plaintiffs have proven . . . [that removing the NDPs] will inure to the benefit of both merchants and customers alike."). In short, the district court found that competition "as a whole," as opposed to just American Express customers, was injured.

C. Restricting the ability of merchants to steer by sharing truthful information about costs disrupts the competitive process and renders the market unresponsive to consumer demand.

One of the key findings of the district court was that the ASRs harmed interbrand competition through "disrupt[ing] the normal price-setting mechanism by reinforcing an asymmetry of information between the two sides of the payment card platform." *Id.* at 209. Other than summarizing the ASRs in the very first paragraph of the decision, *American Express II*, 838 F.3d at 184, the Second Circuit fails to mention this fact again throughout its decision. As Professor Hovenkamp correctly remarks, American Express's interdiction on allowing merchants to provide truthful information to consumers prevents *competition*—as opposed to American Express—from "choos[ing] the optimal mix of revenue between the two sides" of American Express's business. Phillip Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 562(e) (Supp. 2017). As the precedent of this Court and others dictate, this result is antithetical to the purposes of the antitrust laws.

In *Professional Engineers*, this Court found unlawful an agreement among competitors not to discuss prices with potential customers until after negotiations had resulted in the initial selection of an engineer. 435 U.S. at 692. The basis for this conclusion was that the restraint impeded "'the ordinary give and take of the marketplace,' and substantially depriv[ed] the customer of 'the ability to utilize and compare prices in selecting engineering services.'" *Id.* at 692-93 (citation

omitted). Likewise, in *Indiana Federation of Dentists*, this Court wrote that an "effort to withhold (or make more costly) information desired by consumers for the purpose of determining whether a particular purchase is cost justified is likely enough to disrupt the proper functioning of the price-setting mechanism of the market." 476 U.S. at 461-62. So, too, did the Sixth Circuit find unlawful a policy that "prohibited information about exclusive agency and other nontraditional listings . . . from being distributed to public real-estate advertising websites." *Realcomp II, Ltd. v. FTC*, 635 F.3d 815, 819 (6th Cir. 2011). There, the court found that the restrictions on the dissemination of truthful information about lower-priced and innovative competitive alternatives available to consumers "'hinder[ed] the competitive process.'" *Id.* at 829. In all of these cases, the courts recognized that depriving consumers of commercially valuable information fractures the price-setting mechanism that would prevail in a competitive marketplace. *Cf. Expressions Hair Design v. Schneiderman*, 137 S. Ct. 1144 (2017) (concluding that New York's no-surcharge law regulated commercial speech, and remanding to the Second Circuit for consideration of whether this violated the First Amendment). The same is true here.

From an antitrust perspective, the problem of interfering with price-setting mechanisms is clear because such interference renders markets unresponsive to consumer preferences. This Court has concluded that where the "price structure . . . is unresponsive to [consumer] demand and unrelated to the prices that would prevail in a competitive market," the "anticompetitive consequences of [the]

arrangement are apparent." *NCAA*, 468 U.S. at 106-07. Indeed, the First Circuit has gone so far as to say "that overall consumer preferences in setting output and prices is more important than higher prices and lower output, *per se*, in determining whether there has been an injury to competition." *Sullivan v. Nat'l Football League*, 34 F.3d 1091, 1101 (1st Cir. 1994).

The impact on consumer preferences here—on both sides of the platform—is similarly apparent. On the merchant side, merchants cannot "inject price competition into the network services industry by encouraging their customers to use their lowest cost supplier, as they can in other aspects of their businesses." *American Express I*, 88 F. Supp. 3d at 210. On the consumer side, the interference may be even more substantial because American Express cardholders and all other consumers—cardholders and cash payers alike—may not be provided with *any* information about the true costs of their chosen payment methods and are therefore unable to make informed decisions. This is a direct intrusion on the allocative efficiency that free-market competition is intended to enable. Were the ASRs eliminated, all consumers could knowledgeably weigh the benefits of American Express's cardholder rewards against steering inducements offered by merchants to use lower-cost methods of payment. *See id.* at 220. This is the way the competitive process is supposed to function, but because of the ASRs, that aim has been thwarted.

Rather than allowing the competitive process to play out, American Express and the Second Circuit have substituted their views about the value of a specific business model for that of unfettered

competition. And this business model relies on the exercise of market power on the merchant side of the platform to extract the resources needed to subsidize what appears to be an otherwise noncompetitive credit or charge card to consumers on the other side of the platform—in dereliction of well-accepted antitrust analysis. As discussed in more detail below in Part III, this argument amounts to an impermissible defense that American Express's products could not withstand the process of competition absent competitive restraint. *See Prof'l Engineers*, 435 U.S. at 696.

II. THE SECOND CIRCUIT'S UNPRECEDENTED TREATMENT OF THE RELEVANT MARKET ANALYSIS FORSAKES CORE ANTITRUST PRINCIPLES.

While amici do not wish to repeat at length arguments made by Petitioners, the United States, and other amici who have addressed in detail the Second Circuit's glaring error in addressing the issue of relevant product market definition, amici do strongly support the assertion that the Second Circuit's treatment of that question was erroneous. The Second Circuit's entire opinion hinges on the flawed premise that the two sides of the American Express platform—that is, American Express's chosen business model—must be collapsed into a single relevant market. Specifically, the Second Circuit concluded that the district court erred because it "expressly declined 'to define the relevant product market to encompass the entire multi-sided platform.'" *American Express II*, 838 F.3d at 200 (quoting *American Express I*, 88 F. Supp. 3d at 174). The basis for this opinion is that "the price charged

to merchants necessarily affects cardholder demand, which in turn has a feedback effect on merchant demand (and thus influences the price charged to merchants)." *Id.* This conclusion disregards the district court's careful factual findings without determining them to be clearly erroneous and departs from economically sound and settled legal principles governing relevant market definition. It also demonstrates the Second Circuit's lack of appreciation for the interdependence of evidence of actual competitive harm and market definition. In showing that merchants had no alternative but to pay higher network service prices, the evidence of harm supported the district court's market definition.

To begin, the term "relevant market" is not an economic term; rather, it is a term of art with a legal definition. Even two of the economists upon whom the Second Circuit heavily relied acknowledge this: "We try to avoid the term 'two-sided market' because the word 'market' is a term of art for competition policy." David S. Evans & Michael Noel, *Defining Antitrust Markets When Firms Operate Two-Sided Platforms*, 2005 Colum. Bus. L. Rev. 667, 672 (2005). A relevant market contains both a product and a geographic dimension, but only the former is at issue here. "The outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it." *Brown Shoe Co. v. United States*, 370 U.S. 294, 325 (1962). For purposes of antitrust law, product interchangeability is confined to reasonable substitutes in terms of price, use, and quality. *United States v. E. I. du Pont de Nemours & Co.*, 351 U.S. 377, 404 (1956).

"Interchangeability of use and cross-elasticity of demand are not to be used to obscure competition but to 'recognize competition where, in fact, competition exists.'" *United States v. Cont'l Can Co.*, 378 U.S. 441, 452 (1964) (quoting *Brown Shoe*, 370 U.S. at 326).

The Second Circuit's approach also confirms its lack of appreciation for the purpose of market definition in antitrust analysis and its relationship to proving anticompetitive effects. Defining a relevant market and assessing market power can provide a basis for inferring anticompetitive effects. The inquiry thus focuses on the substitutes available to consumers to determine whether they will have alternatives in the event of a price increase. IIB Areeda & Hovenkamp, *supra*, ¶565b n.8 (4th ed. 2013) ("[T]he relevant question [for purposes of defining a relevant market] is . . . whether the competition in one product effectively constrains prices of the other product to the competitive level."). The court erred when it relied on literature intended to describe the features of the two-sided platform as a business model, and veered from these principles, which guide antitrust market definition.

Defining the boundaries of a relevant market often is an intensely factual inquiry, and has long been held as such. Nearly 60 years ago, the Court observed that "Congress prescribed a pragmatic, factual approach to the definition of the relevant market and not a formal, legalistic one." *Brown Shoe*, 370 U.S. at 336. More recently, the Court again affirmed that "[t]he proper market definition . . . can be determined only after a factual inquiry into the 'commercial realities' faced by consumers." *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504

U.S. 451, 482 (1992) (citation omitted); *accord Todd*, 275 F.3d at 199 ("[M]arket definition is a deeply fact-intensive inquiry[.]"). The Second Circuit itself recognized this. *American Express II*, 838 F.3d at 196-97. Yet, the Second Circuit nevertheless chose to displace the factual finding of the district court that GPCC network services constituted a relevant market with its own conclusion that there is a single, "two-sided" relevant market. Again, this conclusion finds support in neither the factual record nor antitrust law.

The district court carefully examined the proper relevant market and concluded that the product market was GPCC network services. *American Express I*, 88 F. Supp. 3d at 170. Considering the facts and guiding legal principles, the district court rejected American Express's argument that the market should be defined as "transactions," finding that the government had "appropriately accounted for the two-sided features and competitive realities that affect the four major firms operating in the GPCC card network services market . . . and that a practical and nuanced application of the standard tools for defining product markets establishes that Plaintiffs' proposed definition is an appropriate underpinning for the court's analysis in this case." *Id.* at 171. Notably, American Express's own executive's testimony established that American Express views itself as competing in three separate businesses: as an issuing bank, as a merchant acquirer, and as a network. *Id.* at 173.

The services provided to cardholders by the card issuers (American Express, Discover, and the other card-issuing institutions) are not an interchangeable product with the GPCC network services (provided

by American Express, Visa, MasterCard, and Discover) of which amici are consumers. More specifically, in the GPCC network services market, Visa, MasterCard, American Express, and Discover sell network services that facilitate and process payment to merchants, who pay a fee to the network services provider that in turn facilitates the customer's purchase with a card. *American Express I*, 88 F. Supp. 3d at 150. In the card issuance market, on the other hand, American Express, Discover, and thousands of Visa- and MasterCard-issuing banks compete to acquire new cardholders by offering co-branded deals, signing corporate card clients, and offering rewards and other benefits that are intended to get consumers to spend on a specific card. *Id.* at 229.

"Products will be considered to be reasonably interchangeable if consumers treat them as 'acceptable substitutes.'" *PepsiCo., Inc. v. Coca-Cola Co.*, 315 F.3d 101, 105 (2d Cir. 2002); *see also Microsoft*, 253 F.3d at 52 ("[T]he relevant market must include all products 'reasonably interchangeable by consumers for the same purposes.'" (citation omitted)). Amici—a group of diverse merchants—cannot substitute GPCCs issued to cardholders for network services. And amici cannot use cardholder services as bargaining leverage or as a competitive constraint on the price of network services. Simply put, network services and cardholder services are not substitutes in terms of price, use, or quality; they are separate products, with completely different purposes and consumers. Cardholder services therefore do not represent a constraint on the ability of network services

providers to raise price, as the record here amply demonstrated.

These factual findings should have been reviewed under the clearly erroneous standard. *See* Fed. R. Civ. P. 52(a)(6). They were not. Yet, the Second Circuit concluded as a legal matter that the district court "erred in excluding the market for cardholders from its relevant market definition." *American Express II*, 838 F.3d at 197. But the Second Circuit's conclusion that the "market for cardholders" was improperly excluded from the relevant product market was neither made with any reference to the record evidence nor tethered to the established test for defining a relevant product market: product interchangeability based on price, use, and quality. *du Pont*, 351 U.S. at 404.

Further, a special legal rule is not required for American Express's business model—a "two-sided platform"—or any other business model that aims to generate revenue from different sets of consumers. As this Court has held, "[t]he 'market' which one must study to determine when a producer has monopoly power will vary with the part of commerce under consideration. *The tests are constant.* That market is composed of products that have reasonable interchangeability for the purposes for which they are produced—price, use, and qualities considered." *du Pont*, 351 U.S. at 404 (emphasis added). Indeed, when confronted with a two-sided business model in the past, this Court did not depart from ordinary rules of relevant market definition. *Times-Picayune Pub. Co. v. United States*, 345 U.S. 594, 610 (1953). Yet, without citing or distinguishing *Times-Picayune*, the Second Circuit completely abandoned these considerations and adopted a new test for

firms that elect to conduct their business on a multi-sided platform. This was error.

The district court correctly concluded that American Express's decision to compete in multiple businesses should not guide the analysis and that the relevant market can be determined only after a factual inquiry into the commercial realities faced by consumers. As amici well know, that reality does not include using cardholder services as a substitute for network services.

III. IMPAIRING THE COMPETITIVE PROCESS TO AID AN OTHERWISE UNCOMPETITIVE FIRM IS NOT A COGNIZABLE PROCOMPETITIVE JUSTIFICATION.

The government convincingly established at trial that the ASRs were anticompetitive. This fulfilled the government's burden of establishing its claim and shifted the burden to American Express to justify its use of the ASRs. *Geneva Pharm. Tech. Corp. v. Barr Labs. Inc.*, 386 F.3d 485, 507 (2d Cir. 2004) ("If the plaintiffs satisfy their initial burden, the burden shifts to the defendants to offer evidence of the pro-competitive effects of their agreement."); *see also Ind. Fed'n of Dentists*, 476 U.S. at 459 ("Absent some countervailing procompetitive virtue . . . an agreement limiting consumer choice by impeding the 'ordinary give and take of the market place' . . . cannot be sustained under the Rule of Reason." (citations omitted)). American Express did not do so, and the district court was correct in rejecting the proffered justifications for the ASRs. Similarly, although it was not framed as a "procompetitive justification" in the decision, the

Second Circuit mistakenly endorsed a principle that has been consistently rejected by the courts: a benefit to one group of consumers (cardholders) cannot justify harm to another (merchants and their customers), simply because on some reckoning of the aggregate effects there is no "net" harm between the two groups of consumers. This view flouts long-established precedent and should be rejected.

In an effort to justify its ASRs, American Express argued that "were the network unable to rely on the NDPs to control merchants' conduct toward its cardholders at the point of sale, the company's ability to pursue its differentiated business model would be invariably and irreparably harmed." *American Express I*, 88 F. Supp. 3d at 225. American Express's position essentially reduces to the following: (1) absent the ASRs, American Express's preferred business model could not survive; (2) with the ASRs, American Express is able to eliminate price competition for network services and raise merchant fees; and (3) American Express can then use some of the additional profits it extracts from merchants and their customers to make its cards more competitive in the card issuance market. *See id.* at 225-27. The district court rejected this "defense." And rightly so. American Express's argument essentially concedes both that the purpose of the ASRs is anticompetitive—that is, to eliminate competition in the network services market—and that its cards are themselves uncompetitive. From this, American Express concludes that it can compete on the terms it prefers (for cardholders) to best advance its business model. This is not a cognizable defense. *See McWane, Inc. v. FTC*, 783 F.3d 814, 841 (11th Cir. 2015), *cert. denied*,

136 S. Ct. 1452 (2016) ("'[C]ognizable justifications are typically those that reduce cost, increase output or improve product quality, service, or innovation.'" (citation omitted)); *cf.* U.S. Dep't of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines § 10 (2010) ("Cognizable efficiencies . . . do not arise from anticompetitive reductions in output or service."). It is not based on any efficiency, as would be true of a reduction in cost, or on a legitimate effort to solve for a market imperfection. To the contrary, it is inimical to the purposes of the Sherman Act.

This Court has squarely held that "the Rule of Reason does not support a defense based on the assumption that competition itself is unreasonable." *Prof'l Engineers*, 435 U.S. at 696. In *Professional Engineers*, this Court sternly rejected the proffered justification that a restraint on competitive bidding would promote competition by enhancing public safety and the ethics of the profession. *Id.* at 695. The Court again rejected such a defense in *NCAA*. The NCAA argued that improving the quality of an uncompetitive product could justify an anticompetitive price or output restraint. But the Court responded that "[b]y seeking to insulate live ticket sales from the full spectrum of competition because of its assumption that the product itself is insufficiently attractive to consumers, petitioner forwards a justification that is inconsistent with the basic policy of the Sherman Act." *NCAA*, 468 U.S. at 117; *see also United States v. Phila. Nat. Bank*, 374 U.S. 321, 370 (1963) (rejecting the notion that "anticompetitive effects in one market could be justified by procompetitive consequences in another").

These cases reflect sound antitrust policy. The Second Circuit took the contrary view, holding that unless the government established a "net" harm across American Express's merchants and cardholders, there could be no Sherman Act violation. *American Express II*, 838 F.3d at 206. In addition, the Second Circuit went so far as to assert that the ASRs might actually *benefit* merchants, writing, "[b]y attracting cardholders, Amex delivers a significant benefit to merchants: Amex cardholders," namely, additional customers. *Id.* at 205. Amici disagree with this premise. If it were true, American Express would not have needed the ASRs, and the unrestrained competitive process would have achieved the same end. Moreover, American Express could not show that the ASRs would increase market-wide output, as opposed to its own. That American Express was unwilling to allow that process to unfold demonstrates that it did not trust the unfettered market to achieve the result that was best for itself and that it claims would have been beneficial to merchants. *Prof'l Engineers*, 435 U.S. at 696 ("[T]he Rule of Reason does not support a defense based on the assumption that competition itself is unreasonable.").

In any event, this Court has condemned in strong terms proffered procompetitive justifications that would obstruct access to information in the name of competition: "The argument is, in essence, that an unrestrained market in which consumers are given access to the information they believe to be relevant to their choices will lead them to make unwise and even dangerous choices. Such an argument amounts to 'nothing less than a frontal assault on the basic policy of the Sherman Act.'"

Ind. Fed'n of Dentists, 476 U.S. at 463 (quoting *Prof'l Engineers*, 435 U.S. at 695)). It derives from a distrust of the competitive process, and admits of a purpose to circumvent it. American Express should not be able to dictate the terms of competition by imposing its preferences rather than allowing the competitive process to determine the proper balance between rewards and discount fees. *Cf. United States v. Apple Inc.*, 952 F. Supp. 2d 638, 701 n.64 (S.D.N.Y. 2013) ("Instead, the evidence is that Apple feared retail price competition with Amazon. Apple preferred to compete with Amazon on the strength of its device rather than through price wars."), *aff'd* 791 F.3d 290 (2d Cir. 2015), *cert. denied*, 136 S. Ct. 1376 (2016). Such a result is to the detriment of consumers, amici, the broader merchant community, and competition.

CONCLUSION

For these reasons, amici curiae respectfully submit that the decision of the Second Circuit should be reversed and the judgment entered by the district court should be affirmed.

Respectfully submitted,

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